IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 251 OF 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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LUHAR TULSIDAS NARSIBHAI - Appellant(s)
Versus
VRAJLAL LALJI VAGHELA - Respondent(s)

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Appearance :
MR. SURESH M. SHAH for Appellant(s).
MR. P.V. HATHI for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 14/08/2006

ORAL JUDGMENT

The defendant being aggrieved by Judgement and Decree dated 8th February, 1982 passed by the learned Extra Assistant Judge, Rajkot at Gondal in Regular Civil

Appeal No.19 of 1978, confirming the judgement and decree passed by the learned Civil Judge at Dhoraji on 30th January, 1978 in Regular Civil Suit No.110 of 1976, whereunder the suit of the plaintiff on his easementary right was decreed.

2. The appeal has been admitted for hearing the parties on the following substantial questions of law:

> *"(1) Whether the document Ex.58 is inadmissible in evidence as it is not registered as required by the provisions of Section 17(1) of the Registration Act? If yes, can it not be used for the limited purpose of pointing out that the so called easement right was only permissible, in view of the agreement with the plaintiff's predecessor in title under the said document?*
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> *2) Whether necessary ingredients of Section 35 of the Easement Act are satisfied for the purpose of grant of injunction sought by the original plaintiff?"*

2. The short and undisputed facts between the

parties are that certain properties belonged to one Ranchhodbhai, which were succeeded by his two sons, namely, Laxman Ranchhod and Tulsidas Ranchhod. The said two brothers agreed to partition the properties and in fact, effected the partition somewhere in the year 1946 under Exh.58. Since after the partition, the parties were enjoying the possession of the property fell in their share as absolute owners without any interference by the other party. The property, which fell in the share of Laxman Ranchhod, came to be sold in favour of Kurgi Jina somewhere in the year 1978, who, in his turn, sold the property in favour of the present plaintiff - Vrajlal somewhere in the year 1976. As the present defendant, Tulsidas, started erecting a wall adjoining the wall of the plaintiff, the plaintiff filed the suit seeking injunction against the defendant - Tulsidas that he be restrained from raising the wall, as the plaintiff has perfected his easementary right to get light and air.

2.1 After the notice, the defendant appeared in the suit and submitted that Exh.58 was subjected to certain terms, certain rights were created in favour of Laxman, the rights were to stand terminated on alienation of the property by Laxman in favour of anybody and as the said right was a permissive right, it cannot be said and

argued that Laxman was enjoying easementary right or has perfected his rights by prescription by getting free air and light from 1946 to 1972. It was also submitted that conditions, as provided under Section-15, read with Section-35, of the Indian Easement Act, 1882 (hereinafter referred to as “the Easement Act” for short) have not been fully satisfied and as the case of the defendant is plain and simple that the right enjoyed by the plaintiff's predecessor in title was a permissive right, the present plaintiff would not be entitled to claim the easementary rights.

2.2 The learned trial Court, after recording the evidence and hearing the parties, came to the conclusion that Exh.58, for want of registration, was inadmissible in evidence. The Court also held that as Laxman and since thereafter the predecessors were exercising their easementary right over the servient heritage belonging to Tulsidas and as the right has perfected by lapse of time, the defendant cannot raise the wall. The dissatisfied defendant preferred an appeal, who, being unsuccessful before the first Appellate Court, is before this Court.

3. Mr.Shah, learned counsel for the appellant-defendant, submits that the document, Exh.58, may be held

to be inadmissible for all practical purposes, but, in accordance with the proviso to Section-49 of the Indian Registration Act, 1908 (hereinafter referred to as “the Registration Act” for short), the document can be read in evidence for limited and collateral purpose. He also submits that if from the document, it clearly flows that the right to be enjoyed by Laxman Ranchhod was permissive right, then, the same would not ripen into easementary right. He further submits that even otherwise his case would fall under Section-15, first explanation, and as the requirements of Section-35 of the Easement Act have not been satisfied, the suit of the plaintiff deserves to be dismissed.

4. The learned Counsel for the respondent, on the other hand, submitted that if the document is inadmissible, then, the terms, which are affecting the partition or which are reserving certain rights in favour of the parties as a result of the partition, would also be inadmissible. He submits that the partition deed if cannot be read in evidence to look into the fact of partition, then, the terms which were settled at the time of the partition also cannot be looked into. For Sections 15 and 35 of the Easement Act, it is submitted that the two Courts below have found that the plaintiff has proved

his absolute right.

5. The document, Exh.58, is dated 4th July, 1946. It is on a stamp worth Rs.47/- and it is unregistered. The document does not recognise or register the partition, which has already taken place, nor does it say that the parties to the documents are acknowledging to the fact of the partition of the property jointly owned by the parties and they were simply putting their signatures to the document of the acknowledgement. There is a clear distinction between a document affecting or creating the partition and a document which is acknowledging the partition. If the partition has already taken place and the parties to the partition just prepare a memorandum of partition or an acknowledgement of the partition, then, such partition is not created by the document and under such circumstances, such document, acknowledging the rights already conferred on the parties, would not fall within the mischief of Section-17 of the Registration Act. The document, which creates a partition and affects the partition *in presentee* and by that document the rights of the parties are crystallised and each party is informed of their rights on the date of the deed itself, then, such document, being a document *in presentee* creating specific rights in favour of the

parties, would be compulsorily registrable if it pertains to tangible, immovable property more than Rs.100/-.

6. If a document, which is compulsorily registrable, is not registered in accordance with the law, then, the document would not be admissible because of the bar contained under Section-49 of the Registration Act.

7. The proviso appended to Section-49 of the Registration Act simply says that the unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.

8. The legal proposition is plain and simple, it provides that an unregistered document can be used as evidence of any collateral transaction not required to be effected by registered instrument. The collateral purpose could be very many, one of the purpose would be the nature of the possession. In the present matter, when the

parties had affected the partition *in presentee,* each of them was reserving certain rights in favour of each other. If the fact of the partition cannot be looked into because the document is unregistered, then, the rights flowing from the said partition also cannot be looked into. It would be improper to say that the fact of the partition be ignored because the document is unregistered, but, the fact of the effect of the conditions settled between the parties, which were as a consequence of the partition, should be looked into. If the effect of the partition or the fact of the partition itself cannot be looked into, then, the benefits flowing from the said partition also cannot be looked into. The submission of Mr.Shah that certain permissive rights were given as a consequence of the partition can be looked into, would run contrary to the language employed in the proviso appended to Section-49 of the Registration Act. Even for the sake of repetition, I will say that if the fact of partition, creation of partition, division of the property cannot be looked into as the document was becoming effective *in presentee,* then, the rights of the parties flowing from the said partition also cannot be looked into. The first question is required to be answered against the interest of the defendant.

9. Mr.Shah next contended that the first explanation appended to Section-15 of the Easement Act would come to his rescue and on the basis of the same, he can pursue the Court to dismiss the suit of the plaintiff.

10. Section-15 provides that where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, the right to such access and use of light or air shall be absolute.

11. Mr.Shah submits that under Explanation I if the servient heritage proves that the right was exercised in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, then, such right would not ripen into an easement.

12. So far as the legal proposition is concerned, I must immediately accept the submission made by Mr.Shah, but, abstract and absolute proposition of law cannot decide the fate of the cases unless within the framework of law or interpretation of the provisions of law, the facts can suitably be fitted. In the present case, the defendant relies upon alleged recitals contained in

Exh.58, that is, the alleged partition deed. I have already held that the said recitals cannot be read into evidence. If the said recitals cannot be read into evidence, then, the defendant would not be entitled to any relief unless by some other evidence, he proves that the plaintiff or his predecessor in title were exercising the right under some agreement. The alleged agreement is contained in a document which is, as a whole, inadmissible in evidence. Flowing of the rights, rather permissive rights, in favour of the plaintiff's predecessor in title if cannot be read because of the bar contained under Section-49 of the Registration Act, then, the defendant would not be entitled to any protection under Explanation I of Section-15 of the Easement Act.

13. It was then contended that the plaintiff was obliged to prove and the Courts below were required to hold that the threatened or intended disturbance was likely to disturb the easement and in absence of such a finding, the suit of the plaintiff could not be decreed.

14. Section-35 of the Easement Act reads as under :

> “35. Injunction to restrain disturbance.-- Subject to the provisions of the Specific Relief Act, 1877 (1 of 1877), sections 52 to 57

(both inclusive), an injunction may be granted to restrain the disturbance of an easement--

(a) if the easement is actually disturbed – when compensation for such disturbance might be recovered under this Chapter;

(b) if the disturbance is only threatened or intended – when the act threatened or intended must necessarily, if performed, disturb the easement."

Clause-(a) to Section-35 provides that if the easement is actually disturbed - when compensation for such disturbance might be recovered under this chapter, an injunction may be granted, while Clause-(b) provides that if the disturbance is only threatened or intended - when the act threatened or intended must necessarily, if performed, disturb the easement, an injunction as prayed for can be granted.

15. In the present matter, the complaint of the plaintiff is that the defendant-Tulsidas proposes to raise the wall abutting his wall where he has certain openings from where he is getting light and air. It is not the case of the defendant that even after construction of the wall, the right of the plaintiff would not be brought to an end. When certain openings are used for getting the light and air, then, construction of

the wall abutting the said small openings would obviously close the openings and would adversely affect the right of the plaintiff, who is exercising his right of easement in getting the light and air.

16. It was also submitted by Mr.Shah that the plaintiff - Vrajlal should have made an inquiry from his predecessors in title that whether they had any easementary right or not. According to him, if Laxman Ranchhod had limited rights till the date of alienation of the property, then, the right would only be counted in favour of the plaintiff-Vrajlal or his vendor, Kurgi Jina, from 1972 only.

17. The argument is misconceived. Once it is held that the document of 1946 (Exh.58) is inadmissible in evidence, then, the very first condition of Section-15 of the Easement Act would stand proved because right from 1946, the access and use of light or air to and for any building have been peaceably enjoyed therewith by Laxman at least for a period of twenty six years. The right was uninterrupted and was within the knowledge of the servient heritage. It is settled law that when a property is sold, it passes to the purchaser with all the rights and obligations. If the plaintiff has purchased the

property with all the rights and obligations, then, the right of easement would also stand transferred in his favour and he would be entitled to tack the right of easement in retrospection right from 1946 to 1976, that is, for a period of thirty years.

18. The two questions framed at the time of admission must be answered against the defendant. The appeal deserves to and is, accordingly, dismissed with costs through out. Counsel's fee of Rs.2,500/- for this Court. A decree be framed accordingly. Interim relief, if any, is vacated.

[R.S.Garg, J.]

*kamlesh**